UNITED STATES GOVERNMENT
National Labor Relations Board

Memorandum

TO : Peter W. Hirsch, Regional Director
Region 4

DATE: APR 30 1986

FROM : Harold J. Datz, Associate General Counsel
Division of Advice

240-3367-3340
240-3367-5076

SUBJECT Haddon Craftsmen, Inc.
Case 4-CA-15161-1

This case was submitted for advice on whether deferral to an arbitration award under Olin Corporation 1/ is appropriate where the arbitrator found that the Employer's unilateral reassignment of employees to a lower job classification was privileged by a contract provision, based in part on the absence of certain evidence.

FACTS

Haddon Craftsmen, Inc. (the Employer) and Graphic Arts International Union Local 97B (the Union) have had a collective-bargaining relationship for many years.

The most recent collective-bargaining agreement (the "Agreement") extends from April 4, 1983 to April 6, 1986. Historically, job classifications for the unit employees have been labeled Bookbinder A through Bookbinder D, with Bookbinder A the highest paying position and Bookbinder D the lowest. The Agreement sets forth the wages of each classification, provides certain bumping rights in the event of layoffs, and requires each party to maintain seniority lists for each job classification. In addition, Article III, Paragraph 7(a) provides:

> When an employee is assigned to a higher rated job he shall immediately be paid according to the rate for this job. When an employee has been permanently assigned to a job rated lower than that which he has been performing, his wages shall be adjusted to conform to the rate assigned to the job in question. It shall be the responsibility of the Foreman and the Steward to determine when such an assignment is to be considered permanent.

The Region found that the past practice has been to pay an employee based on his or her job classification when performing work classified at a lower level and to pay qualified employees the higher rate of pay when performing work classified at a higher level. Thus, it appears that the Employer has never invoked its right under Article III, Paragraph 7(a) to assign an employee permanently to a lower rated job and to pay him at that lower rate.

1/ 268 NLRB 573 (1984).

On April 22, 1985 the Employer issued a memorandum to all Bookbinder B and C employees stating that, effective June 3, 1985, all those employees would be "returned" to the Bookbinder D classification at the lower rate of pay and that the Employer would pay higher rates only when employees actually performed Bookbinder B or C work. The Employer attributed its action to "changes in market demand" for Bookbinder B and C skills. The Union received a copy of the Employer's memorandum at about the same time that it was issued to the employees. The Union received no other notice of this change, which the Union claimed was at odds with past practice. The Employer refused the Union's demand to bargain over those actions. On June 6 the Union filed a grievance 2/ protesting the changes, alleging that the changes violated the Agreement and contravened past practice. The Union demanded immediate rescission of the changes, restoration of all affected employees to their prior classifications and backpay. On July 1, the Union filed the instant charge, which was deferred under Collyer. 3/

On October 22, 1985, the arbitrator heard the grievance. The Union presented only one witness at the hearing, the Union president, and the Employer presented no witnesses. There was no transcript of the hearing, and the parties did not file post-hearing briefs. 4/ On November 1 the arbitrator issued a 13-page opinion and award denying the Union's grievance.

According to the arbitral award, the Union contended at the hearing that the Employer had: (1) improperly eliminated jobs; (2) improperly reclassified the incumbents in those jobs to lower-rated positions; and (3) unilaterally changed the provisions of the collective-bargaining agreement in that regard in violation of the Agreement and the Act. Further, the Union had argued that Article I, Paragraph 3, which defined the scope of unit work, and Article III, Paragraph 10 of the Agreement protected all unit employees from "involuntary re-classification" from their regular wage classification to lower wage classfications, regardless of their actual work assignments. Thus, while the Employer could assign employees to work temporarily at a job in a lower wage classification, the Union argued, those employees would continue to

2/ About a week later, the Union filed two other grievances, alleging as violative the discharges of a Bookbinder B employee and the Union president for engaging in conduct protesting the reclassification of the B and C employees. These discharges were also a subject of the instant charge, although they were not submitted for advice. In both cases, arbitral awards have issued in favor of the Union.

3/ Collyer Insulated Wire, 192 NLRB 837 (1971); see also United Technologies Corp., 268 NLRB 557 (1984).

4/ The Employer has refused to participate in the Region's investigation. The statement of the conduct of the arbitration proceeding is based upon the Charging Party's assertions and the arbitrator's opinion and award.

be entitled to their regular wages, not the lower wages. 5/ Apparently, the Union never raised Article III, Paragraph 7(a) of the Agreement in its argument nor presented any evidence related to that provision. The Union also argued that the Employer's action violated an "unspecified 'duty to bargain' obligation--under the National Labor Relations Act." In this regard, the Union submitted, and the arbitrator included in the text of the award, the contents of the Board charge that were relevant in this case. 6/

On the other hand, the Employer argued that the Agreement provided no protection to employees against reassignments from positions having no work to positions in which there is work. In addition, the Employer denied that it had eliminated any positions, but argued that even if it had, the Agreement did not prohibit it from doing so. The Employer further asserted that it had acted merely to formalize the permanent nature of the assignments that had existed for some time, pursuant to Article III, Paragraph 7 of the agreement. In this regard, the Employer noted that all of the grievants had been assigned indefinitely to Bookbinder D duties and that no B or C duties would become available in the foreseeable future. The Employer relied heavily in its defense of the grievance on the Union's failure to make certain claims. Thus, it noted that the Union had not claimed that the Bookbinder B and C work functions were "totally different" from the functions of the Bookbinder D job, that there was no claim that the Employer could not lay off any employee from any job under the agreement, and that the Union did not claim that, in a lay-off situation where more senior employees exercise the right to "bump" less senior employees out of lower-rated jobs, the Employer had to continue paying the more senior employee the higher rate of pay. Finally, the Employer denied that it had unilaterally changed the parties' Agreement, disputed the Union's claim that the Agreement guarantees the wage rates and classifications of employees, and relied upon the failure of the Union to cite specific provisions of the Agreement expressly requiring bargaining over the change as further evidence supporting its position that it had no such obligation.

The arbitrator denied the Union's grievance on the following bases: (1) the Employer's action did not deny employees any seniority benefits due under their collective-bargaining agreement because the re-classified employees could return to their old classifications in order of seniority when work in those jobs was available; (2) the evidence showed that those Bookbinder B and C positions that were vacated were not eliminated, but even if they had been eliminated, the Employer was not barred by the Agreement from doing so

5/ The Union also relied upon Appendices A, B, and C of the Agreement, which established the wages and wage progression schedules for each job classification.

6/ As noted at n. 2, the instant charge also included allegations regarding the discharges of two employees, regarding which the Union filed separate grievances.

unilaterally; and (3) Article III, Paragraph 7 of the Agreement privileged the Employer, after having permanently assigned Bookbinder B or C employees to Bookbinder D work pursuant to the prescribed procedure, to pay the lower wage rate to those employees.

With regard to the arbitrator's third conclusion, stated above, the arbitrator wrote:

> While the evidence fails to show whether "the Foreman and the Steward" of these employees had made or participated in any determination that the specific reassignments in issue had been of a "permanent" nature, there is no claim or other evidence to the contrary, on either point, in this case. No such issue is raised herein.
>
> On the precise facts in evidence herein, it, reasonably, must be concluded that the reassignments in issue were of a "permanent" nature--within the meaning of the above-quoted Agreement provisions. (emphasis in original)

He then added: "The absence of any claim that the [Employer] had violated any negotiated 'procedure' therefor [sic] lends further support for its claim of 'rights' to have taken such actions, . . . in this case." (emphasis in original) 7/ In conclusion, the arbitrator found that the permanent reassignments of Bookbinder B and C employees to Bookbinder D work had been "authorized and intended" under the Agreement, and he therefore denied the Union's grievance.

ACTION

We concluded that deferral is not appropriate in the instant case because, under Olin, the arbitrator did not adequately consider the unfair labor practice issue that is the subject of the Union's charge.

7/ In addition, in response to the Union's claim that the Bookbinder B and C employees enjoyed wage status guarantees regardless of the work they performed, the arbitrator stated: "While Article II [sic], Paragraph 7 language of the Parties' Agreement provisions is shown to have required such [higher] wage rates for periods of 'temporary' reassignments to lower rated jobs, where any reassignments were of an indefinite or 'permanent' nature however--as, apparently, had been the case here--no 'guarantees' thereof can be said to have been intended, therein, on any basis." (emphasis in original)

The Board will defer to an arbitration award when (1) the proceedings have been fair and regular; (2) all parties have agreed to be bound; and (3) the arbitrator's decision is not clearly repugnant to the Act's purposes and policies. 8/ In addition, the arbitrator must have adequately considered the unfair labor practice issue. 9/ The Board will find that the arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was generally presented with the facts relevant to resolving the unfair labor practice. 10/ Further, the burden is on the party opposing deferral to demonstrate the defects in the arbitral process or award. 11/

In Wheeling-Pittsburgh Steel Corporation 12/ the Board refused to defer to an arbitration award because the arbitrator had not been presented generally with the facts relevant to resolving the unfair labor practice. In that case, the ALJ found, and the Board agreed, that the statutory issue was factually parallel to the contractual issue of whether an employee had a reasonable basis for his fear that the crane on which he was ordered to work was unsafe to operate. The evidence concerning the arbitration hearing showed, however, that (1) the arbitrator, who had not heard the testimony of two witnesses to the malfunction of the crane because they had not been notified of the arbitration hearing, had drawn an adverse inference from those witnesses' failure to testify; (2) in spite of uncontroverted evidence to the contrary, the arbitrator found that the grievant had not asked for a safety committee representative to examine the equipment; (3) the arbitrator did not have all of the evidence regarding the repair of the crane between the grievant's shift and the next shift; and (4) the arbitrator misread the testimony of a third witness concerning the malfunction of the crane.

In the instant case, we would concede initially that the contractual issue of whether the contract privileged the Employer's unilateral reclassification of Bookbinder B and C employees to the status of permanent Bookbinder D employees is factually parallel to the statutory issue of whether the Employer had an obligation under the Act to bargain over those reassignments. 13/ Both issues rely on the same facts, such as the provisions of the parties' collective-bargaining agreement, the past practice between the parties, and the existence of any waiver by the Union of its bargaining rights. But even if the contractual issue is factually parallel to the unfair labor practice issue, the fact remains that the arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice. 14/

8/ Spielberg Mfg. Co, 112 NLRB 1080 (1955).
9/ Raytheon Co., 140 NLRB 883, 884-885 (1963).
10/ Olin Corp., 268 NLRB 573 (1984). See also Badger Meter, 272 NLRB 824 (1984).
11/ See Olin, supra, 268 NLRB at 574.
12/ 277 NLRB No. 160, n. 2 (December 31, 1985).
13/ It is undisputed that the proceedings were fair and regular and that the parties agreed to be bound. Because of our conclusion here, there is no need to reach the question of whether the award is repugnant to the purposes and policies of the Act.
14/ Because there is no transcript to the proceeding, we must rely on the arbitrator's opinion and award to determine whether the Olin standards have been met. Cf. Martin Redi-Mix, Inc., 274 NLRB No. 79 (February 28, 1985).

Thus, the arbitrator stated that neither party presented any evidence regarding whether the Employer complied with Article III, Paragraph 7(a) of the Agreement, which requires that the foreman and the steward determine when an assignment is to be considered permanent. Indeed, he stated that no such issue was raised in the arbitration proceeding and inferred from the absence of evidence that, in fact, such a determination had been made. 15/ He then concluded that, having complied with Article III, Paragraph 7(a), the Employer was privileged to reclassify those employees and reduce their wages without violating the Agreement or the Act. The award points to no evidence of a past practice or a waiver privileging the Employer to ignore the last sentence of Article III, Paragraph 7(a). The evidence presented to the Region, moreover, indicates that the Employer had never before made a permanent reassignment under Article III, Paragraph 7(a). Thus, clearly there was no past practice of effecting such a change without the concurrence of the Union. Further, the Region has no evidence that the Union waived its right to determine with the foreman when an assignment should be considered permanent. Thus, evidence on a factual issue that is critical to the resolution of the unfair labor practice was not presented to the arbitrator. 16/ Moreover, inasmuch as the Employer presented the reassignments to the Union as a fait accompli on April 22, it seems clear that the union steward was not given an opportunity to comply with the requirements of Article III, Paragraph 7(a) in this instance. Therefore, as in Wheeling-Pittsburgh Steel, above, the arbitrator improperly drew a negative inference from the absence of critical evidence at the hearing. Accordingly, the arbitrator was not presented generally with the facts relevant to resolving the unfair labor practice and, therefore, could not be said to have adequately considered the unfair labor practice issue. Accordingly, deferral to the arbitrator's opinion and award is not appropriate.

H. J. D.

15/ This is not a case where the arbitrator was presented with some evidence, which, while lacking in detail, was sufficient to find that the parties had generally presented the evidence related to the resolution of the unfair labor practice. Cf. Hilton Hotels Corporation, 272 NLRB 488, 489 (1984).

16/ We note that the Board in Olin emphasized that it was not returning to the rule established in Electronic Reproduction Service, 214 NLRB 758 (1974), that deferral is warranted if there was an "opportunity" to present the unfair labor practice issue to the arbitrator. 268 NLRB at 575, n. 10.